No. 89-65

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FORT STEWART SCHOOLS,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO AS AMICI CURIAE SUPPORTING RESPONDENTS

MARK D. ROTH
KEVIN M. GRILE
80 F Street, N.W.
Washington, D.C. 20001

LAWRENCE A. POLTROCK
125 South Wacker Drive
Suite 2700
Chicago, IL 60606

JEREMIAH A. COLLINS
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 10006
(202) 637-5390

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-65

FORT STEWART SCHOOLS,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, AND THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO AS AMICI CURIAE SUPPORTING RESPONDENTS

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total

membership of approximately 14 million working men and women, including many federal employees whose compensation is not specifically set by statute and who are therefore directly affected by the issues presented in this case. The American Federation of Government Employees, AFL-CIO ("AFGE") and the American Federation of Teachers ("AFT") are the national unions affiliated with the AFL-CIO which primarily represent federal employees and educational employees, respectively.

ARGUMENT

Introduction and Summary of Argument

It is common ground in this case that the vast majority of nonpostal federal employees[1] and their unions have had no right, either before or after the enactment of the Federal Service Labor-Management Relations Statute,[2] to bargain on the subject of compensation.[3] Instead, compensation for those employees has been set by Congress, through such instrumentalities as the familiar General Schedule wage scales, *see* 5 U.S.C. 5332. Thus for most federal employees compensation is "specifically provided for by Federal statute," 5 U.S.C. 7103 (a) (14) (C), and for that reason is *not* subject to bargaining, *id.*

---

[1] Postal employees are subject to a separate statutory scheme. In this brief all references to "federal employees" are to nonpostal employees, unless otherwise indicated.

[2] Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.* ("FSLMR Statute" or "the Statute").

[3] Throughout this brief we will use the terms "compensation," "wages," "pay" and their synonyms interchangeably. And, we will not distinguish among the three separate proposals of the respondent Fort Stewart Association of Educators ("the Association") that are at issue here. This is not to say that such distinctions might not become relevant depending on how certain of the issues presented are resolved.

But it is also undisputed that there are certain categories of federal employees, including those involved in this case, whose compensation historically has *not* been set by statute. Prior to the enactment of the FSLMR Statute, if such employees were represented by a union the employing agency could *not*, as a general matter, unilaterally set their wages; the agency had a duty to bargain with respect to compensation just as it did with respect to other matters. *See infra* at 14.

After the enactment of the Statute, it remains the case that Congress does not set the pay for these limited categories of employees. Accordingly, the question presented in this case is whether as a result of the enactment of the FSLMR Statute the compensation of these employees is to be set not by bargaining (as was the case before enactment), nor by Congress (as has historically been the case for those federal employees whose pay has not been determined through bargaining), but by the unilateral action of the employing agency.

In arguing that the FSLMR Statute should be construed to produce that result, petitioner advances an extraordinarily constricted view of the permissible scope of bargaining under the Statute. First, petitioner asserts that bargaining is never permitted with respect to anything but "the physical aspects of the working environment." Pet. Br. at 14. Second, even as to matters in that narrow range, petitioner asserts that bargaining is foreclosed if a union proposal would result in any "significant increase in the cost of operating [the specific agency program affected by the proposal]." *Id.* at 15. *See also id.* at 28 ("a proposal is . . . barred [if] it has more than a *de minimis* budgetary effect"). And finally, as if the two points just stated would not suffice to kill the beast, petitioner urges an expansive reading of the statutory provision that relieves an agency of the duty to bargain with respect to any matter dealt with by an agency regulation for which there is a "compelling need." *See id.* at 31-36.

We show in this brief that petitioner's construct is worlds away from what Congress intended when the Legislature, animated by the principle that "collective bargaining in the civil service [is] in the public interest," 5 U.S.C. 7101(a), enacted the FSLMR Statute.

In Part I we show that compensation is a "condition of employment" which, when not specifically fixed by statute, is a proper subject for bargaining under the FSLMR Statute.

In Part II we show that management's right "to determine the . . . budget . . . of the agency," 5 U.S.C. 7106(a)(1), does not prohibit bargaining merely because a proposal may be costly, but only prohibits bargaining over the agency's budget *as such*.[4] The bargaining proposals at issue here do not run afoul of that proscription.

Finally, in Part III we show that 5 U.S.C. 7117(a)(2), which allows an agency to refuse to bargain over a matter contained in an agency regulation for which there is a "compelling need," was intended by Congress to be construed narrowly, and that the claim of "compelling need" advanced here by petitioner cannot survive under the congressionally prescribed standard.

I. COMPENSATION THAT IS NOT SPECIFICALLY SET BY STATUTE CONSTITUTES A CONDITION OF EMPLOYMENT AS TO WHICH BARGAINING IS REQUIRED UNDER THE FSLMR STATUTE

With certain specified exceptions, the Federal Service Labor-Management Relations Statute places on federal agencies an obligation to bargain with their employees who have chosen a union representative with respect to

[4] When we refer in this brief to bargaining that is "foreclosed" or "prohibited" by the Statute, or when we describe a matter as "nonbargainable," we simply mean that bargaining is not *mandated* by the Statute, and that no bargaining will take place if management chooses not to bargain.

all "conditions of employment."[5] Again with certain specified exceptions, the term "conditions of employment" is defined broadly to include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. 7103(a)(14).

A. Starting, as we must, with "the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," *Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1607 (1989), *quoting Richards v. United States*, 369 U.S. 1, 9 (1962), it is evident that "conditions of employment" encompasses wages and other economic benefits of employment. A "condition" is "something established or agreed upon as a requisite to the doing or taking effect of something else." *Webster's Third New International Dictionary* 473 (1986). Given the economic arrangements in this society it is an understatement to say that the fact—and the quantum—of compensation is a "requisite" to an employee's accepting or continuing "employment," or to his "working." Furthermore, when used in the plural the word "conditions" refers broadly to the "attendant circumstances" or "existing state of affairs" respecting a matter. *Id.* An employee's compensation is certainly one of the "attendant circumstances" or the "existing state of affairs" respecting his "employment" or his "working."

There is consequently no basis for petitioner's assertion that "[t]he phrase 'conditions of employment' suggests the physical aspects of the working environment, not com-

[5] *See* 5 U.S.C. 7102(2) (employees have the right "to engage in collective bargaining with respect to conditions of employment"); 5 U.S.C. 7103(a)(12) ("'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees . . . to . . . bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees"); 5 U.S.C. 7114(b)(2) ("[t]he duty of an agency and an exclusive representative to negotiate in good faith . . . shall include the obligation . . . to be . . . prepared to discuss and negotiate on any condition of employment").

pensation." Pet. Br. at 14. That extraordinarily narrow definition not only conflicts with the plain meaning of the statutory words, but is belied by 5 U.S.C. 7103 (a)(14)(B). That provision of the FSLMR Statute excludes "the classification of any position" from the mandatory subjects of collective bargaining. Congress thus evinced its understanding that without such a proviso the terms "conditions of employment" and "working conditions" would encompass "matters relating to the classification of any position." *See* 124 Cong. Rec. 29183 (1978) (statement by Representative Udall, the author of this provision, explaining that "the effect of this new exclusion would be to remove the classification of positions from collective bargaining"). The classification of a position is *not* one of "the physical aspects of the working environment," Pet. Br. at 14. And if position classification is a "condition of employment" within the meaning of the statute (or, more precisely, if that would be the case but for the express exception in Section 7103(a)(14)(B)), there is no basis for asserting that wages are not likewise a condition of employment.

B. To construe the phrase "conditions of employment" as including compensation is consistent with Congress' usage in other provisions of the Civil Service Reform Act ("CSRA") (The FSLMR Statute, as we have seen, is Title VII of that Act.). In Title IV of the CSRA, dealing with federal employees in the Senior Executive Service, Congress provided for "a *compensation* system, including salaries, benefits, and incentives, *and for other conditions of employment*." 5 U.S.C. 3131(1) (emphasis added).[6]

[6] Petitioner refers to 5 U.S.C. 3131(1) as part of what is denominated as the "Senior Executive Service Act;" and petitioner seeks to dismiss that "Act" as a "relatively obscure statute[]." Pet. Br. at 19 n.9. But the fact of the matter is that 5 U.S.C. 3131(1) is part of Title IV ("Senior Executive Service") of the *Civil Service Reform Act itself*, see 92 Stat. 1154 (1978); and Title IV was viewed by Congress as "one of the most significant elements of the Civil Service Reform Act," S. Rep. No. 969, 95th Cong., 2d Sess. 67 (1978).

That provision plainly expresses the understanding that the term "conditions of employment" includes "compensation." "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (citations omitted).

In other statutes as well, Congress has evinced the understanding that compensation is a "condition of employment."[7] For example, 18 U.S.C. 4082(c)(2)(iii) provides for "*the rates of pay and other conditions of employment*" (emphasis added), for federal prisoners on work-release. So too, Section 9(a) of the National Labor Relations Act provides for bargaining "in respect to *rates of pay, wages*, hours of employment, *or other conditions of employment*," 29 U.S.C. 159(a) (emphasis added), and the syntax of that phrase makes it apparent that "rates of pay, wages, [and] hours" are all examples of "conditions of employment."[8] Similarly, the preamble to the NLRA refers to "the friendly adjustment of industrial disputes arising out of differences as to *wages*, hours *or other working conditions*." 29 U.S.C. 151 (emphasis added).

The lesson to be drawn from these statutes is that the phrase "conditions of employment" is understood by Congress to include wages. Petitioner would have it otherwise, and points to certain other statutory provisions which, according to petitioner, use the phrase in a nar-

[7] In ascertaining the meaning of particular words as used in one statute it is of course appropriate to consider how the same words have been used in other statutes, as long as proper regard is given to the specific contexts in which the words have been used. *See generally, e.g., Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 108 S. Ct. 376, 381 (1987).

[8] If, as petitioner suggests, Br. at 18 n.8, Congress meant only to refer to *hours* as conditions of employment, the phrase would have read "rates of pay, wages, or hours of employment and other conditions of employment."

rower sense. Those provisions do *not* support petitioner's argument.

Petitioner refers, for example, to Section 8(d) of the NLRA, which provides that the duty to bargain under that Act applies with respect to "wages, hours, and other terms and conditions of employment." According to petitioner, "[t]he symmetry of the phrase suggests that wages were thought to be a 'term' and hours a 'condition' of employment." Pet. Br. at 18 n.8. That is nonsense. Section 8(d), enacted in 1947, clarifies the nature of the NLRA duty to bargain, and Section 9(a), enacted in 1935, defines an NLRA union's exclusive *authority* to bargain. Given the relationship between the two provisions, the "conditions of employment" encompassed by Section 9(a) are necessarily coextensive with the "terms and conditions of employment" encompassed by Section 8(d), or else the statute would have no internal logic: NLRA unions would not have any *authority* to bargain about "terms" of employment (because the grant of authority in Section 9(a) refers only to "conditions," not "terms"), yet NLRA unions and employers would have a *duty* to bargain about "terms" as well as "conditions" (Section 8(d)).

Petitioner's theory that there is a crucial difference between "terms" and "conditions" founders for another, simplier reason as well: one of the *synonyms* for the word "condition" is "term." *Webster's Third New International Dictionary*, *supra* at 473 ("TERM, used in the plural in this sense, indicates conditions offered or agreed to in a contract, deal, or agreement.") Thus, where Congress has used the two words together the conjunction is for emphasis, and does not suggest that the Legislature ascribes different meanings to the words. *Compare Pipefitters v. United States*, 407 U.S. 385, 421-26 (1972) (terms "separate" and "segregated" in phrase "separate segregated fund" used as synonyms for emphasis rather than with distinct meanings).[9]

[9] It is therefore not surprising that even though the FSLMR Statute refers to "conditions of employment" and does not use the word "terms," the legislators referred to the bargaining obligation as encompassing "terms and conditions" of employment, 124 Cong. Rec. 25721 (1978) (Representative Ford), and this Court has similarly stated that "[i]n general, unions and federal agencies must negotiate over terms and conditions of employment." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983). *See also FLRA v. Aberdeen Proving Ground*, 108 S. Ct. 1261 (1988) (FSLMR Statute "requires that federal agencies and labor organizations bargain in good faith concerning the terms and conditions of employment").

Petitioner also seeks to make much of the fact that the Postal Reorganization Act refers to a right to bargain over "wages, hours, and working conditions," 39 U.S.C. 1201 note. Petitioner states that Congress "thus distinguished between 'wages' and 'working conditions.'" Pet. Br. at 18. But if that were so, it would follow that Congress likewise distinguished between "*hours*" and "working conditions." Yet petitioner appears to accept that "hours" are "working conditions;" if not, 5 U.S.C. 7103(a)(14) would exclude every issue concerning hours of work from bargaining under the FSLMR Statute, and even petitioner does not reach for that proposition. It is therefore apparent that nothing can be inferred from the fact that Congress referred in the Postal Reorganization Act to "wages, hours, and working conditions" rather than to "wages, hours, and *other* working conditions." Indeed, nothing turned on whether the word "other" was or was not used in that provision: under either formulation, "wages" would be subject to bargaining, and all "working conditions" would be subject to bargaining.

Nor is it the case, as petitioner asserts, that Congress "has always specifically mentioned compensation when it intends to authorize wage bargaining." Pet. Br. at 17-18. For example, the Norris-LaGuardia Act states that the public policy of the United States is that employees should be free, through their designated representatives, "to negotiate the terms and conditions of [their] employment." 29 U.S.C. 102. Although wages are not specifically mentioned in that statute, no one would deny that wage bargaining was included in—indeed, was central to—the

bargaining Congress sought to encourage in the quoted provision of the Norris-LaGuardia Act. Furthermore, unlike the statutes to which petitioner refers which mention "wages" as being among the subjects for bargaining, in the FSLMR Statute Congress did not identify *any* specific subjects of bargaining, but simply used the generic terms "conditions of employment" and "working conditions." It does not follow from this that wages are excluded from bargaining, any more than it follows that the various other subjects, such as hours of work, that are specifically mentioned in the other statutes cited by petitioner but not in the FSLMR Statute are excluded.

C. To construe the Statute as allowing wage bargaining where the pay of federal employees is not specifically set by statute is consistent not only with the Statute's language but with its animating premises and purposes. Congress declared in no uncertain terms that "collective bargaining in the civil service [is] in the public interest," because, *inter alia*, such bargaining "safeguards the public interest . . ., contributes to the effective conduct of public business, and . . . facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment." 5 U.S.C. 7101(a). In enacting the bargaining provisions of the FSLMR Statute "Congress unquestionably intended to strengthen the position of federal unions and to make the collective bargaining process a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 107 (1983).[10]

[10] Petitioner asserts that federal sector wage bargaining, with the possibility that contract terms may be imposed by the Federal Services Impasse Panel, *see National Federation of Federal Employees v. FLRA*, 789 F.2d 944 (D.C. Cir. 1986), would "effect a 'withdrawal of political accountability.'" Pet. Br. at 26, *quoting Nuclear Regulatory Commission v. FLRA*, 879 F.2d 1225, 1231 (4th Cir. 1989), *petition for cert. pending*, Nos. 89-198 and 89-562. The difficulty with this assertion is that it reduces the Statute to a nullity; the same argument could be made as to federal sector bargaining on *any* subject. What petitioner calls a "withdrawal of political accountability" *Congress* called good faith collective bargaining, which the Legislature sought to encourage.

To be sure, Congress determined that the scope of bargaining should not be unlimited; but Congress was explicit in fashioning the limitations the Legislature deemed appropriate. Thus, Congress excluded certain subjects, such as position classification, from the scope of bargaining, 5 U.S.C. 7103(a)(14), *see supra* at 6; placed restrictions on bargaining over "management rights," 5 U.S.C. 7106, *see infra* at 21-25; provided that the right to bargain would not extend to "matters . . . specifically provided for by Federal statute," 5 U.S.C. 7103(a)(14)(C), *see supra* at 2; and specified the extent to which bargaining would be required with respect to matters that are the subject of rules or regulations, 5 U.S.C. 7117, *see infra* at 25-26.

In contrast, Congress did not explicitly exclude compensation from the scope of bargaining. Where, as in this case, wage bargaining would not run afoul of any of the specific limitations and exclusions fashioned by Congress, there is simply no reason to believe that the Legislature intended to foreclose such bargaining.[11] Indeed, given Congress' firm declaration that federal employee bargaining serves the public interest and should be encouraged, the appropriate presumption is that in the absence of any clear provision to the contrary, bargaining over wages should be permitted. As Representative Ford, quoting the earlier House Report, stated with respect to the "man-

[11] It must be recalled that in this setting the alternative to bargaining is not a congressionally-determined compensation structure, as in the usual case where federal employees are not allowed to bargain over wages, but a compensation scheme established unilaterally by the employing agency. *See supra* at 3. There is not the slightest hint that the Congress that wished to encourage "the amicable settlement of disputes" through bargaining, 5 U.S.C. 7101(a), sought to bring about such a regime of unilateral agency action for any federal employees. *See infra* note 23.

agement rights" provision, the FSLMR Statute should "be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or proposal." 124 Cong. Rec. 29198 (1978), *quoting* H.R. Rep. No. 1403, 95th Cong., 2d Sess. 44 (1978).[12]

D. There is all the more reason to construe the term "conditions of employment" in the FSLMR Statuate as including compensation because the Statute's definition of that term was drawn essentially verbatim from Executive Order 11491, *where the same language had been construed to include compensation as a proper subject for bargaining.*

The Executive Orders dealing with federal labor-management relations had their genesis in a 1961 Presidential Task Force report. That report, after noting that "[t]he employer in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because "[t]hese are established by law," [13] recommended that in designing a new federal labor-management relations program the scope of bargaining might be defined to include such matters as "the work environment," "grievance procedures," "and *where permitted by law* the implementations of policies relative to *rates of pay* and

[12] Petitioner therefore gets it backward in arguing that "clear evidence" of an intent to authorize wage bargaining should be required. *See* Pet. Br. at 27. Petitioner's contention that clear evidence should be required because "wages and fringe benefits lie at the core of collective bargaining in the private sector," *id* at 14, 26, is particularly mystifying. Petitioner fails to explain the logic by which Congress, with its strong endorsement of collective bargaining, *see supra* at 10, should be presumed to disfavor "the core" of that process.

[13] President's Task Force on Employee-Management Relations in the Federal Service, *A Policy for Employee-Management Cooperation in the Federal Service* (1961), reprinted in House Comm. on Post Office and Civil Service, Subcomm. on Postal Personnel & Modernization, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute* (Comm. Print 1979) (hereinafter "Leg. Hist.") at 1177, 1200.

job classification." [14] President Kennedy praised the Task Force report, stating that "[i]ts recommendations will provide an effective system for developing improved employee-management relations," and he directed "that an Executive Order giving effect to the Task Force recommendations be prepared." Leg. Hist. 1178. In describing those recommendations, the President specifically noted the Task Force's statement that "*where salaries* and other conditions of employment *are fixed by Congress* those matters are not subject to negotiation." *Id.* (emphasis added).[15]

The Executive Order that ensued defined the subjects for bargaining as "personnel policy and practices and matters affecting working conditions." [16] By 1969 the language had been put into the form in which it remained up to the enactment of the Federal Service Labor-Management Relations Statute, by changing the word "policy" to "policies." *See* E.O. 11491, § 11(a) (Oct. 29, 1969), reprinted in Leg Hist. at 1250. That is precisely the formulation that Congress enacted into law as the definition of bargainable "conditions of employment" in § 7103 (a)(14) of the Statute, except that Congress dropped one of the two "and"s and inserted the phrase "whether established by rule, regulation, or otherwise" to modify the phrase "policies, practices, and matters"; changes which,

[14] Id. at 1201 (emphasis added).

[15] It should be noted that President Kennedy's statement provides yet another instance in which "salaries" are referred to as a "condition of employment."

[16] Executive Order 10988 (1962), § 6(b), reprinted in Leg. Hist. at 1214. The pertinent portion of § 6(b) stated as follows:

> The agency and [union] . . . shall meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements. This extends to the negotiation of an agreement. . . . [*Id.*]

if anything, broadened the provision, but did not alter the sense of the words.

Construing these very words in the Executive Order, the Federal Labor Relations Council had specifically held that wage proposals were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11a(a) of the Order." *United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 218 (1972). *Accord, Overseas Education Association, Inc. and Department of Defense Dependents Schools*, 6 F.L.R.C. 231 (1978). Thus the following principle is applicable: "where, as here, Congress adopts a new law incorporating sections of a prior law [in this case, an Executive Order], Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).[17]

That presumption is "particularly appropriate" where Congress "exhibited both a detailed knowledge of the [prior] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Id.* That is certainly true of the FSLMR Statute. The process of developing the Statute consisted, in essence, a series of decisions by Congress as to which provisions of the Executive Order would be retained, which would be discarded, and which would be modified. *See, e.g.*, 124 Cong. Rec. 25720 (Representative Clay), 25721 (Representative Ford), 29198 (Representative Ford); H.R. Rep.

---

[17] *See also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 108 S. Ct. 1704, 1711-12 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Albernaz v. United States*, 450 U.S. 333, 341 (1981); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979).

No. 1403, *supra* at 44.[18] The provision requiring agencies to bargain with respect to "working conditions," which had been construed to encompass bargaining over compensation, was one of the provisions Congress decided to retain.[19]

E. Nor does the legislative history evince any intent to cut back on the wage bargaining that was permitted by the Executive Order, or to preclude bargaining where wages are not specifically set by statute. To the contrary, Congress did not intend to "be narrowing the preexisting collective bargaining practices of any group of Federal employees." 124 Cong. Rec. 25722 (1978) (Representative Ford).

1. Petitioner asserts that "Congress twice rejected proposals to make pay negotiable." Pet. Br. at 20. Neither of those so-called "rejections" lends any support to petitioner's position.

---

[18] Some provisions bearing on the scope of bargaining, such as the "management rights" provision, were extensively rewritten. *See* the legislative history just cited, and compare the management rights provision of the Executive Order, Leg. Hist. 1346, with 5 U.S.C. 7106 as enacted.

[19] We do *not* suggest that all FLRC interpretations of the Executive Order are, *per se*, controlling under the Statute. *See Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. at 103 n.13. In particular, Congress was concerned that the FLRC, a "part-time management-oriented [body]," 124 Cong. Rec. 29187 (1978) (Representative Clay), had *unduly restricted* the scope of bargaining in some of its decisions. *Id.*; *see also id.* at 29198 (Representative Ford). (The FLRC consisted of the Secretary of Labor, the Chairman of the Civil Service Commission, and the Director of the Office of Management and Budget, "none of whom can be considered neutral." *Id.* at 25721 (Representative Ford).) But we are not aware of any respect in which Congress concluded that the FLRC had allowed *too great* a scope of bargaining. To the contrary, Congress' purpose (accomplished, by example, in the narrowing of the Executive Order's management rights provision, *see supra* note 18) was to allow for a *broader* scope of bargaining than had prevailed under the Order. *See* 124 Cong. Rec. 29187 (Representative Clay), 29198 (Representative Ford).

a) The bill introduced by Congressman Ford (H.R. 9094) to which petitioner refers, Br. at 20, would have revolutionized federal pay practices by providing that "[the] pay and benefits of each statutory pay and benefits system," Leg. Hist. 263-64—including, for example, the GS schedule—would be determined through the recommendations of a government-wide labor-management Federal Employees Pay and Benefits Committee, *id.* at 264-67, 272-73, culminating, in the event of disagreement, in arbitration before an Arbitration Board on Federal Employees Pay and Benefits, *id.* at 265-68, 273-75.[20] Congress' failure to enact such a novel and sweeping proposal carries no implications for the issue presented here.

b) Equally disingenuous is petitioner's assertion that "in the House committee markup, Representative Heftel unsuccessfully introduced a more limited proposal that would have extended the obligation to negotiate to 'pay practices' and 'overtime practices' so far as 'consonant with law and regulation.'" Pet. Br. at 20-21.

In reality, the provision proposed by Representative Heftel *enumerated eleven specific matters* which the obligation to negotiate "includes, but is not limited to." Leg. Hist. 1087. The subjects so listed included not only "pay practices," but also such matters as "safety and health" and "grievance and arbitration procedures," *id.* at 1087-88; and the proposed provision stated that agreements as to *any* negotiable matter had to be "consonant with law and regulation," *id.* at 1088. The fact that Congress did not adopt this provision (which is nowhere discussed in the legislative history) no more evinces an intent to disallow bargaining over pay practices than an intent to disallow bargaining over safety and health, grievance and arbitration procedures, or any of the other *concededly bargainable* subjects that were enumerated in Represent-

[20] This proposed system is what Congressman Ford was referring to when he mentioned H.R. 9094's "provision for the negotiation of pay," 124 Cong. Rec. 25721 (1978).

ative Heftel's draft.[21] The most reasonable explanation for Congress' failure to adopt the Heftel approach—or more precisely, for Congress' failure to adopt *any* provision listing specific examples of negotiable matters—is that the term "conditions of employment" was thought to be both broad enough and clear enough to convey the congressional intent without the need for a list of examples. In other words, in Congress' view such a list was "unnecessary," *cf. United States v. Wells Fargo Bank*, 108 S. Ct. 1179, 1184 (1988). Indeed, Congress may have understood as well that any effort to compose such an enumeration would have been ill-advised because of the difficulty of producing a sufficiently all-encompassing list.

2. Nor do the statements from the legislative reports and debates that are cited by petitioner, Br. at 21-23, support the contention that the Statute was intended to extinguish wage bargaining in the contexts where it had been permitted by the Executive Order, *viz.*, where wages are not specifically fixed by statute. To be sure, there are some broad statements in the legislative history to the effect that the FSLMR Statute does not create an obligation to bargain about wages. But two important themes run through those statements: first, that in this area the statute would continue prior law; and second, that the

[21] Safety and health is presumably the paradigm negotiable subject in petitioner's view, as it involves "the physical aspects of the working environment," Pet. Br. at 14. As for grievance and arbitration procedures, not only are they negotiable, but the Act states that any collective bargaining agreement *must* provide for such procedures. 5 U.S.C. 7121(a)(1).

The provision proposed by Representative Heftel, like the bill ultimately enacted, provided that the duty to bargain applied "with respect to personnel policies and practices and matters affecting working conditions." Leg. Hist. 1087. Thus, all of the eleven enumerated examples of bargainable matters were plainly considered by Representative Heftel to constitute "matters affecting working conditions." There is no indication that any member of Congress had a different understanding of the meaning of that phrase.

limitation on wage bargaining is an instance of the general rule that employment conditions set by statute are not bargainable and that with very narrow exceptions statutory laws specifically prescribe the pay of federal employees.

Thus, the House Report cited by petitioner, Br. at 21, states that "[f]ederal pay will *continue* to be *set in accordance with the pay provisions of title 5*, and fringe benefits, including retirement, insurance, and leave, will *continue* to be *set by Congress*." H.R. Rep. No. 1403, *supra* at 12 (emphasis added). With even greater precision, the Report goes on to state that "[r]ates of overtime pay are not bargainable, *because they are specifically provided for by statute*." *Id.* at 44 (emphasis added).

Similarly, Representative Udall, after making the statement quoted in petitioner's brief at 22,[22] went on to explain with his next breath that "[a]ll these *major regulations about wages* and hours and retirement and benefits will *continue* to be *established by law through congressional action*." 124 Cong. Rec. 29182 (1978). (emphasis added).

Representative Ford, in another passage cited by petitioner, stated that bargaining was not to be permitted over "*matters that are governed by statute* (such as pay, money-related fringe benefits, retirement, and so forth)." *Id.* at 25721 (emphasis added).

So too, Representative Collins, who unsuccessfully proposed that the House narrow the scope of permissible bargaining, complained that "the House committee bill broadly defines scope of bargaining by saying that 'conditions of employment' excludes only matter relating to discrimination, political activities, and those few specifically *prescribed by law*—for example, pay and benefits." *Id.*

[22] *Viz.*, that there "is not really any argument in this bill or in this title about federal collective bargaining for wages and fringe benefits and retirement—the kinds of things that are giving us difficulty in the Postal Service today." 124 Cong. Rec. 29182 (1978).

at 29174 (emphasis added). To the same effect is the statement by Representative Clay, cited in petitioner's brief at 22, that from the outset the House bill had excluded bargaining over "that which is prohibited by law," such as pay. *Id.* at 24286.

Thus, fairly read in context, the statements on this subject by all the leading participants in the debates make two consistent points. *First*, that the Statute would continue prior law as to the scope of wage bargaining. And *second*, that the scope of such bargaining would be delimited by laws that specifically prescribe the pay of federal employees. In other words, these statements do not suggest that wages are not "conditions of employment;" rather, the statements refer to the exclusion from "conditions of employment" in 5 U.S.C. 7103(a)(14)(C) of "matters . . . specifically provided for by Federal statute."

What is more, even petitioner acknowledges that under the Statute *some* federal employees can bargain over wages.[23] And petitioner likewise concedes that at the

[23] As petitioner notes, Br. at 19, Section 704 of the CSRA provides that certain craft employees who bargained over compensation prior to the enactment of the Prevailing Rate Act, 5 U.S.C. 5341 *et seq.* (the so-called "grandfathered" Prevailing Rate employees) may continue to do so, "without regard to any provision of [the FSLMR Statute]." 5 U.S.C. 5343 note. Since petitioner acknowledges that Congress intended to permit at least *this* category of employees to bargain over compensation, petitioner is necessarily wrong in asserting that the legislative history stands for the proposition that no federal employees may do so.

Nor does any negative inference flow from the fact that Congress referred specifically to the wage bargaining rights of grandfathered Prevailing Rate employees but did not refer to the rights of other employees, such as those employed in the domestic dependent schools, who also had the right to negotiate over compensation. It was necessary for Congress to refer specifically to the Prevailing Rate employees, for two reasons. First, decisions of the Comptroller General that were rendered while the Statute was being drafted had held that grandfathered Prevailing Rate employees could not bargain on certain subjects, and, as Representative Ford

time Congress was debating the Statute, federal employees whose pay was not fixed by statute had been held generally to have the right to do so. *See* Pet. Br. at 24; and *see supra* at 14. It is therefore apparent that when the legislators made statements to the effect that federal employees could not bargain about compensation, they were referring to the situation that is *typical*, but *not universal*, in the federal sector, *viz.*, the situation where compensation is specifically fixed by federal statute.[24]

---

put it, a specific provision overruling those decisions was "required" in order to "preserve the scope of collective bargaining heretofore enjoyed by [those employees]." 124 Cong. Rec. 25722 (1978). Second, but for the proviso in Section 704, all Prevailing Rate employees might be precluded from negotiating over pay on the ground that their pay was "specifically provided for by Federal statute," namely the Prevailing Rate Act. (Indeed, the FLRA has subsequently held that Section 7103(a)(14)(C) has precisely this effect on Prevailing Rate Act employees who did not bargain over wages prior to 1972. *Army and Air Force Exchange Service, Dallas, Texas and AFGE*, 32 F.L.R.A. 591, 597, 600 (1988) (separate opinion of Member McKee).)

In contrast, Congress had no reason to think that *non*-Prevailing Rate Act employees such as those involved in this case would lose their established bargaining rights in the absence of an explicit proviso, and there was accordingly no need for Congress to enact a proviso with respect to those employees.

Thus, the proper lesson to be drawn from Congress' action with respect to Prevailing Rate Act employees is that in the one situation where federal employees who had previously bargained over wages might have lost that bargaining right had the 1978 Congress not specifically acted to preserve it, Congress did so act. Petitioner has offered nothing to suggest why Congress would wish to destroy the wage bargaining rights of employees such as those involved in this case at the same time that the Legislature was acting to preserve (indeed, to restore) the bargaining rights of the Prevailing Rate Act employees just discussed. To the contrary, it was in this very context that Representative Ford stated: "Certainly, we should not now be narrowing the preexisting collective bargaining practices of *any* group of Federal employees." 124 Cong. Rec. 25722 (1978) (emphasis added).

[24] It must be recalled that there had been an effort in Congress to enact a system under which *all* federal employees would have

Thus, neither the statutory language nor the legislative history provide any basis for concluding that employees whose pay is not specifically set by statute, and who therefore had the right to bargain over compensation under the Executive Order, lost that right when the FSLMR Statute was enacted.

II. THE STATUTORY EXCLUSION OF BARGAINING OVER "THE BUDGET OF THE AGENCY" DOES NOT PRECLUDE BARGAINING OVER COMPENSATION PROPOSALS SUCH AS THOSE AT ISSUE HERE

In enacting the Statute Congress provided that a proposal concerning conditions of employment is not bargainable if the proposal would conflict with the "management rights" set out in 5 U.S.C. 7106. One of the rights so enumerated is the right of management "to determine the mission, budget, organization, number of employees, and internal security practices of the agency." 5 U.S.C. 7106(a)(1).

Petitioner maintains that respondent's compensation proposals would violate "management's right to set the budget." Pet. Br. at 27. Petitioner's theory is that any bargaining proposal, and not simply a wage proposal, is nonnegotiable under Section 7106(a)(1) if the proposal has any "significant"—*i.e.*, "more than . . . de minimis" —cost impact on the particular agency program involved. *See* Pet. Br. at 28-29.

The FLRA and the court below accepted this approach to a degree, but held that the test should be whether

---

their pay set by a form of negotiation and arbitration. *See supra* at 15-16. Thus, there was every reason for supporters of the Statute to point out that as finally drafted, the bill would have no dramatic effect with respect to wage bargaining. This, rather than any intent to preclude such bargaining in every possible context, no doubt explains why supporters of the legislation thought it necessary to offer assurances on this subject.

adoption of the union's proposal would significantly increase the overall costs of the agency as a whole, rather than the costs of a particular program, and whether the union's proposal would have "compensating benefits" for the agency. Pet. App. 20a.

Although the FLRA's approach comes closer than petitioner's to capturing the congressional intent, we submit that respondent Fort Stewart Association of Educators is correct in stating that the most reasonable construction of the words Congress used is that a union cannot bargain about an agency's budget *as such*. To bargain about wages is not to bargain about the budget, any more than to bargain about safety and health, which has major cost consequences, is to bargain about the budget. And, to argue that there is some magical level (whether relatively high or relatively low) at which a wage proposal or a safety proposal becomes an effort "to determine the agency's budget" is to strain language beyond the breaking point.

As best we can determine, the concept of "budget" as a nonnegotiable matter goes back to Executive Order 10988 (1962), which provided that the obligation to bargain "shall not be construed to extend to such *areas of discretion and policy* as the mission of an agency, its budget, its organization and the assignment of personnel, or the technology of performing its work." Leg. Hist. 1214 (emphasis added). We submit that this is the sense of Section 7106(a)(1) as well, and that a wage proposal cannot be said to enter an "area of discretion and policy" merely because the raise proposed is, say, 10% rather than 1%.[25]

[25] An example involving a related aspect of Section 7106(a)(1) may help to make the point. That provision, in addition to referring to management's right to determine the budget, states that management has the right "to determine the . . . number of employees in the agency." Virtually any union proposal dealing with workload might potentially lead to the hiring of additional personnel, in which case the proposal would, by petitioner's reasoning, violate management's right to determine the number of employees. Yet, in a very small agency (or, under petitioner's approach, in a very small agency *program*), a union proposal calling for a small reduction in each employee's workload might not lead to additional hiring, because the aggregate reduction might be less than one man-year, while in an enormous agency or program the same proposed reduction might add up to a full man-year, such that the agency would proceed to hire an additional employee. On petitioner's theory, in the small agency the union's proposal would be negotiable, because it would not lead to any actual hiring, while in the large agency management could refuse to bargain. This makes no sense. The correct approach is to say that in neither case is the union seeking to bargain about "the number of employees in the agency;" rather, the union is seeking to bargain about workload.

The legislative history supports this construction by making it clear that Congress did not intend Section 7106 to be given a broad reach. Representative Udall, who authored the compromise language that was enacted as Section 7106, and whose views should, as petitioner acknowledges, "be accorded significant weight,"[26] stated that the provision "is . . . to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." 124 Cong. Rec. 29183 (1978). Similarly, the Committee Report on the House bill that preceded the Udall compromise had stated that "section 7106 . . . [should] be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal," H.R. Rep. No. 1403, *supra* at 44; and Representative Ford, who together with Representatives Clay and Udall worked out the compromise language that was enacted,[27] stated that "[i]n agreeing to the

[26] Pet. Br. at 22, *citing Simpson v. United States*, 435 U.S. 6, 13 (1978). The Udall compromise added to the bill certain management rights that had not been included in the House bill as reported out of committee. *See, e.g.*, 124 Cong. Rec. 29183 (Representative Udall), 29198 (Representative Ford).

[27] *See* 124 Cong. Rec. 29197 for a discussion of the roles of Representatives Udall, Ford and Clay in this regard.

Udall compromise . . ., we fully intend that the committee's original position go unchanged and that this section be narrowly construed." 124 Cong. Rec. 29198 (1978). Even more to the point, Representative Clay declared that "it is essential that only those proposals that *directly and integrally* go to the specified management rights be barred from the negotiations." *Id.* at 29187 (emphasis added).

In view of this legislative history, it is highly unlikely that when Congress referred to the right of an agency to determine its budget, the Legislature's purpose was to preclude bargaining over each and every proposal that would involve significant costs. Such a purpose would be at odds with the Statute's basic theory. As Congress undoubtedly was aware, any meaningful process of collective bargaining, whether in the private or public sector, consists in large part of resolving the conflict between a union's desire to obtain greater benefits for the represented employees and management's desire to avoid the attendant costs. The genius of collective bargaining is its ability to produce "amicable settlements of [such] disputes," 5 U.S.C. 7101(a). When Congress declared in the FSLMR Statute that labor-management disputes should be resolved through collective bargaining, *see supra* at 10, there is no reason to think that what the Legislature had in mind was a stultified form of bargaining in which disputes about costs would not be determined *by* bargaining, but would instead determine whether there should even *be* bargaining.[28] And, had Congress wished to state that only low-cost proposals were negotiable, the Legislature doubtless

[28] In *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 584-85 (1960), the Court recognized the realities of industrial relations in stating that a grievance of a type that is "grist in the mills of the arbitrators" should not be found to be non-arbitrable except on the basis of "the most forceful evidence of a purpose to exclude the claim from arbitration." Similarly here, competing claims about costs are "grist in the mills" of collective bargaining, and it should not lightly be assumed that Congress intended to remove such matters from the bargaining table.

would have done so directly, rather than in the roundabout fashion petitioner claims to discern in the budget provision.

For these reasons, the budget proviso should be read to apply only to proposals that seek to bargain about the agency's budget as such. This case involves no such proposals.[29]

III. THE ASSOCIATION'S PROPOSALS ARE NOT INCONSISTENT WITH ANY REGULATION THAT IS SUPPORTED BY A COMPELLING NEED

Petitioner's final contention is that certain of the Association's proposals deal with matters covered by an agency regulation for which there is a "compelling need," and that the proposals are therefore removed (at least in part) from bargaining by 5 U.S.C. 7117(a)(2). That contention ignores Congress' intent that "compelling need" be literally construed as a very narrow exception to collective bargaining.

Congress was aware that if Section 7117(a)(2) were given undue breadth, the provision could undermine the entire statutory scheme, because on *any* issue that may

[29] If the construction just advanced were to be rejected, it would then become necessary to determine what level of cost renders a proposal nonbargainable under the budget proviso. On that point, as the brief of the respondent Association demonstrates, the language of Section 7106(a)(1), which refers to "*determin*[*ing*]" the budget "*of the agency*," cannot by any stretch reach proposals that would not produce an unavoidable increase in the "*budget*" (and not just in its *costs*) of the "*agency*" (and certainly not just the costs of a particular *program*).

We agree with the Association's demonstration that on the facts presented here petitioner has not made such a showing. Indeed, even the contention on which petitioner ultimately rests—*viz.*, that the Association's proposals would "result in an unavoidable and significant increase in the cost of operating the Fort Stewart Schools," Pet. Br. at 15—is unsupported by the facts, as the Association's brief demonstrates.

arise affecting conditions of employment an agency may opt for the course of stating its position in the form of a regulation and may assert that its regulation meets a "compelling need." Lest this exception swallow Congress' rule favoring collective bargaining, *see supra* at 10, it is necessary, as the House Report emphasizes, that the "compelling need" exception be construed literally, as limited to a "*demonstrated*, and *justified*, and *overriding* need," H.R. Rep. No. 1403, *supra* at 51 (emphasis added).[30] The FLRA has properly carried out that congressional intent by defining "compelling need" as that which is "essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency." 5 U.S.C. 2424.11 (a). By the express mandate of Section 7117(a)(2), whether there is a compelling need is to be "determined under [those] regulations."

Thus, it is plainly not enough for petitioner here to show that its regulation is reasonable or even desirable. After all, under the scheme of the Statute it is the role of the bargaining process and, if necessary, the Federal Services Impasse Panel, to decide whether labor's position or that of management should prevail. Only in an extraordinary case should management's position, even if embodied in an agency regulation, be deemed so "compelling" as to preclude resort to those processes. We agree with respondent Association's detailed showing that this is not such a case.

---

[30] The Report was referring to a provision that would have allowed bargaining over *government-wide* regulations that lacked a "compelling need." The Udall compromise moved the "compelling need" test to the context of agency-level regulations, and provided that matters contained in government-wide regulations are outside the scope of bargaining even in the absence of a compelling need. *See* 5 U.S.C. 7117(a)(1). But there is no reason to think that the meaning of the words "compelling need" was changed when the words were made applicable to agency regulations rather than government-wide regulations.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MARK D. ROTH
KEVIN M. GRILE
80 F Street, N.W.
Washington, D.C. 20001

LAWRENCE A. POLTROCK
125 South Wacker Drive
Suite 2700
Chicago, IL 60606

JEREMIAH A. COLLINS
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 10006
(202) 637-5390